

INFORMATION  
FOR  
JAMES ERSKINE of Grange,  
*Advocate* ;  
AGAINST  
John Cant, *common Clerk of the Burgh of*  
*Innerkeithing.*

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4th July 1734.

# INFORMATION FOR

## JAMES ERSKINE of *Grange*, Advocate,

AGAINST

*John Cant, common Clerk of the Burgh  
of Innerkeithing.*

**J**AMES ERSKINE of *Grange*, and *Henry Cunningham* of *Buquhan*, did, for some Time before the Elections of Members to serve in this present Parliament, stand as Candidates for being elected to serve in Parliament for the District of Burrows of *Innerkeithing, Stirling, Dumfermling, Culross and Queensferry*.

*ferry*; but before the Time of Election came, Mr. *Cunningham* being named Governor of *Jamaica*, and so disqualified from sitting in the House of Commons Master *Erskine* continued to offer his Service to those Burghs; but who might be the other Candidate, was for some time uncertain. Thus far only was known, That Mr. *Cunningham* was to transfer his Interest to some other Person, in Opposition to Master *Erskine*, and at last Captain *Peter Halket* younger of *Pitfirrin* came out to be the Person that was to be set up in Opposition.

Three of these five Burrows declared themselves in favours of Master *Erskine*, judging him to be the Person that was most likely to serve them in a disinterested Manner, *viz.* *Stirling*, *Dumfermling* and *Queensferry*: And accordingly two Delegates were chosen for *Stirling* and *Queensferry*, both in his Interest, and he himself was chose Delegate for the Burgh of *Dumfermling*.

By this Means the Majority was clearly on Master *Erskine's* Side, and he could not fail to be duly elected, and must of consequence have been returned, if a fair and free Choice had been to be made the Rule of Returning: But it now appears that another Scheme was laid, Mr. *Cunningham* had secured the Interest of the Burgh of *Innerkeithing*, and the Burgh of *Culross* was prevailed upon to join in Measures with him. *Innerkeithing* was the presiding Burrow; Mr. *Cunningham* was chose Delegate for it; and *John Cant*, his known Agent, and Manager of many of his Affairs, and part of his Estate, was the common Clerk of that Burrow, and so by Law the Returning Officer. And that being the Case, it was indeed pretty apparent, that a good Understanding betwixt the Delegate and Clerk of the presiding Burgh might have some Influence on the Return, if a Method could be fallen upon to make two the Majority of five; or if by political Chirurgery, an Amputation could be made of one of five Members of the elective Body from the other

four, that so the Delegate for the presiding Burrow might have a Pretence for a double Vote. And this Method was accordingly pursued by Mr. *Cunningham* in a very extraordinary Manner, which your Lordships will be more particularly informed of afterwards, and was most unduly given way to by Mr. *Cant* the Returning Officer.

Upon the Day appointed by the Law for the Election, the Delegates for the whole five Burghs appeared; and three of them, *viz.* those for *Stirling*, *Dumfermling* and *Queensferry*, gave their Voices for Master *Erskine* to be Member of Parliament for that District; the other two only gave theirs for Captain *Peter Halket*: So that the Majority was plainly for Master *Erskine*. Notwithstanding which, Mr. *Cant*, the Returning Officer, hath thought fit to return the Name of Captain *Halket* to the Sheriff of *Fife*, as the Person duly elected to serve for that District: Which Return the Sheriff was obliged to annex to the Writ; though it was not done without a Protest on the Sheriff's part against Mr. *Cant*, That he the said *Cant*, and not the Sheriff, should be liable and accountable for all the Illegalities he had committed in the Matter of that Return.

As this is one of the most gross Violations of the Freedom of Elections that hath at any time been ventured upon by a Returning Officer, and so much the more aggravated, as it is done in contempt of a Law so lately made for preventing such Abuses, Master *Erskine* hath thought himself obliged, in Duty to his Country in general, and to his own Electors in particular, as well as in Justice to himself, to bring his Petition and Complaint before your Lordships against Mr. *Cant*, laid upon the late Act of the 7th of his present Majesty, intituled, *An Act for the better regulating the Election of Members to serve in the House of Commons for that Part of Great Britain called Scotland, &c.* by which it is enacted, " That every common Clerk of any presiding Burgh, who shall wilfully return to the Sheriff or Steward any Person other than the Person elected, or who shall

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“ neglect and refuse to return the Person duly elected, shall forfeit the Sum of five hundred Pounds to the Person intitled to have been returned, to be recovered in manner directed by the Act ; ” and cannot doubt that your Lordships, by a just Application of the Act in this case, will make Returning Officers sensible that they are not beyond the Reach of the Law, and that so gross and bare-fac’d Contempts of it are not to be covered over with such slight Disguises as the Transgressor in this case hath made use of.

Mr. *Cant* hath put in his Answers, and the Case hath been heard before your Lordships in Presence ; upon which you have been pleased to order Parties to inform. And the Sum of Mr. *Cant*’s Defences seems to resolve in these : 1<sup>st</sup>, That this being a Matter which touches the due Election of a Member of the House of Commons, of which that Honourable House are the undoubted Judges, that your Lordships cannot take Cognizance of it, until the Merits of the Return and Election be tried before them ; at least that it is convenient for your Lordships to do so, to prevent a Collision of Jurisdictions betwixt the House of Commons and Court of Session, which might happen, if different Judgments should be given upon the same Point.

2<sup>do</sup>, That supposing the Return in this case to be erroneous, yet it was no wilful Act of Mr. *Cant*’s, but must be ascribed to the Delegates, Mr. *Cant* having made the Return according to the Votes of the Majority of those whom the Delegates judged to be lawfully intitled to vote ; and that they only were the Judges of the Commissions and Capacity of the Delegates, and not Mr. *Cant* the Returning Officer.

3<sup>rd</sup>o, That this Matter having turned upon the rejecting of the Commission to the Complainier, to be Delegate for *Dumfermling*. That the Objections against that Commission were sufficient in Law to warrant the rejecting or taking no Notice of it.

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As to the first, it was answered for the Complainant, That there is no Doubt made of the Jurisdiction of the House of Commons, with respect both to the Merits of a Return and Merits of an Election, and as little doubt as to the Effect of that Judgment: No doubt it is final and decisive, upon the Member's Right of sitting in that House, both upon the Merits of the Election it self, where these are tried, and upon the Merits of the Return, where these only are tried. The one gives the Member a perpetual Right to be Member of the House, the other gives him the Right of interim Sitting, untill the Merits of the Election be finally discussed; and no Judgment of any other Court, can have any Influence as to the Member's Right of Sitting in either Case: But then their Judgment hath no other Effect, than to fix and determine the Parliamentary Right with respect to the Member himself. The House of Commons may indeed likewise punish in a Parliamentary Way, a Returning Officer whom they find negligent or malversing in his Duty: But they have no Jurisdiction to levy a Penalty imposed by Statute, upon a Returning Officer, where, by the Statute it self, the Power of judging such Officer, and imposing the Penalty, is given to the ordinary Courts at Law, as in this Case, where the Power and Jurisdiction is expressly given to your Lordships, yea, where you are not only empowered, but expressly required to proceed in a summary Way, upon fifteen Days Notice, without further Delay.

It were a very absurd Construction of the Act of Parliament, where the Act it self hath limited the Complainant to bring in his Action within three Months of the Return, and appointed your Lordships to proceed upon so short Notice, without further Delay; yet to pretend that you cannot proceed untill the Matter be judged of in the House of Commons, that is a plain Inconsistency. Had the Intention of the Law been such, the Complainant could never have been obliged to bring his Action or Complaint, but within such

such a Time of the Determination given by the House of Commons; nor would the Law have given your Lordships Power to impose the Penalty, without any mention of, or respect to the Judgment of that Honourable House. Had it been otherwise designed, then the Penalty must only have been imposed, in case of the Return being found undue by the Judgment of the House of Commons. But the Law plainly intended no such Thing; but hath thought proper that a Check should be put upon Returning Officers, by imposing a Penalty to be judged of and levied at common Law. This was thought necessary for securing the Freedom of Parliament, and of Consequence, of the whole Constitution. And this summar Method of Proceeding, appears to be expressly directed with this View and Reason, that the ordinary Courts of Justice might apply the Law as it is, without being predetermined, or at all influenced by the Resolutions of the House of Commons.

The Laws of Parliament are the Rules by which the House of Commons are to judge; but your Lordships and all other Judges are to judge by the Common and Statute Law. And to use the Words of the great Chief Justice *Holt*, " The Cause of the Plaintiff's Suit, is a Wrong done out of Parliament; and whatever falls under the Regulation of Law, and is done out of the House of Parliament, is subject to the Laws of the Land; for Laws are to be executed out of Parliament: But as for the Rules of the House, as sitting, meeting, &c. they are within the House, and the Judges cannot know them, there being no Practice of them out of Parliament. But if the Parliament make a Law concerning them, or if they should become necessary to be determined on account of some other Matter cognoscible by the Judges, the Judges must take notice and determine them." And so in this Case, the Parliament having made a Law against false and undue Returns, and committed the Execution of it in the most summary way to your Lordships,

ships, you are tied down to judge, without respect to the Proceedings in Parliament, or without being obliged to know whether there will be any Proceedings or not ; yea it is impossible you can know it : And therefore if your Lordships should not proceed as the Law hath required, it would be no less than a direct Contradiction to, and Contempt of the Law itself.

The Complaint in this Case is nowise brought against the Member returned; he is no Party to it. It must then be very extraordinary to pretend, That where an Action is brought against a third Party, upon an express Statute, for Recovery of a Penalty which can be levied by this Court only ; that Judgment cannot be given until a Question betwixt other Parties, which may be and may never be a Question at all, be determined by another Court, who is to proceed according to the Laws of Parliament, and not upon the Statute.

We hope we will be excused to say, that in such a Case the Resolutions in Parliament are no Rule for your Lordships to proceed on, either one way or other : The Law is your Rule, and that only ; and if their Resolutions cannot be a Rule of Judging, how can it be Law, that you must wait their Judgment before you can proceed ? or that you can wait for it, where the Act of Parliament hath required you to go on in so summary a way ? Such a Plea tends to nothing else but an eluding of the Law, and rendering it intirely useless.

It is certain that the Plaintiff may bring his Petition in Parliament, or not, as he thinks fit : When such Petition is brought before the House, they may judge of the Return, if they please, by itself; they may judge of the Merits of the Return, and Election, together ; they may judge of the Merits of the Election itself, without considering the Merits of the Return at all ; they may delay giving any Judgment so long as they think proper : Is it then in such a Case to be

once mentioned as Law, that where the Statute hath required you to proceed in so summary a way, that you cannot proceed till the Event of certain Contingencies, which may or may not happen; and which, happen as they will, can be no Rule for your Lordships judging? This were to establish a Power in the House of Commons to suspend the Execution of the Laws, not only by positive, but dilatory Resolutions: A Power, which they are too tender of the Constitution ever to endeavour to assume.

The Defendants endeavoured to support their Plea, from some Cases taken down by *Salkeld*, and other Observers of the Reports in *England*, particularly that of *Prideaux versus Morice*; which Case is summed up by the Observer upon the Margin of his Book in those Words, *No Action lies at Common Law against an Officer for a false Return of Members to Parliament, unless where the Right is determined, or cannot be determined in Parliament*. But, with Submission, this is nothing at all to the purpose: The Case, as observed, answers itself: The Action was an Action on the Case, or an Action on Common Law; not an Action upon the Statute: And the Distinction between these two is trite and known. It was it seems held as a Doubt, whether an Action upon the Case for a false Return could be carried on, until the Right of Election was determined in Parliament; and as to this their great Lawyers seem to have differed. But then there is no Instance of its having been made a Doubt, that where an Action was brought upon the Statute, either of *Henry VI.* or the 7th and 8th of *K. William*, that there the Action lay without respect to any Determination in Parliament. And this appears very plain from the next Report, save one, observed by *Salkeld*, *Coundel versus John*: The Summary of that Report, as marked by the Observer, is, *Action lies not for a false Return, but upon the Statute 7th and 8th William III.* This was likewise an Action upon the Case, wherein the Plaintiff declared that he was elected Member

Member of Parliament for such a Burgh, pursuant to the Queen's Writ to the Defendant, who returned two other Persons to be elected: That the Plaintiff petitioned the House, and was adjudged to be duly elected; after which he brought his Action, and a Verdict was given against the Defendant: And he having moved an Arrest of Judgment, on this Ground, That there lay no Cause of Action, for that it appeared now the Plaintiff had the Effect of his Election, was returned, had his Place, and nothing wanting wherein he could pretend to be injured, but the Costs he had been at in Prosecution; and as to them, it ought to be supposed that the House considered of them. On the other hand, the Plaintiff endeavoured to support his Complaint upon the Statute 7th and 8th of K. *William*. But then it was answered for the Defendant, That the Declaration could not be taken to be founded upon that Statute, for several Reasons there assigned arising from the Form of the Declaration: And because the Plaintiff had not brought his Declaration or Action upon that Statute, Judgment was given for the Defendant.

There arise several Observations from this *Report*, no ways favourable for the Defendant's Plea, but which clearly establish the Distinction betwixt Actions on the Case and Actions upon the Statute. In the first Place, the Sense of the Publisher of the *Report* is plain from the Summary he makes of it, That an Action upon the Fact, as there stated, did not ly but upon the Statute of the 7th and 8th of King *William*. But then it did ly upon that Statute; and therefore Judgment was given for the Defendant, because the Action was an Action on the Case, and not upon the Statute: And an Action on the Case not being for any particular Penalty, but for Damages and Costs in general, it was thought it did not ly, because the Plaintiff had the Effect of his Return; and so had no Damage, except the Expence of following forth his Petition, which the Court supposed the House of Commons had taken notice of. But had the Acti-

on been brought upon the Statute, there the Demand would have been for the Penalty to which the Person injured was by the Statute intitled ; and his Demand for that would have been good, notwithstanding he had got his Seat in Parliament ascertained.

2do, Your Lordships will observe how inconsistent the Defendant's Plea is with the Example with which he would endeavour to support it. His Plea, or rather Demurrer, is, That your Lordships can't proceed till the House of Commons give their Judgment. If that have any Meaning, it must be, until the House of Commons give their Judgment that the Return is an undue Return. This he endeavours to support by Examples from Actions on the Case : Yet your Lordships see by this *Report*, that an Action on the Case would not ly, and was in this case adjudged not to ly after the House of Commons had given Judgment that the Return was undue, because the Plaintiff then had no Damage. This makes it not very easy to comprehend the Rationality of that Opinion, even with respect to an Action on the Case, That the Action does not ly until the House of Commons have given their Judgment ; for at this rate it would not ly before Judgment by the House of Commons, because the Courts at Law must not anticipate or contradict that Judgment. It cannot ly after Judgment is given in the Plaintiff's favours, and his Seat ascertained ; because he hath no Damage, and so no Cause of Action. Then there remains only a third Case, That the House of Commons have judged, and have determined against the Plaintiff, by finding the Return a due Return. Neither can it ly there, according to this Doctrine ; because as the ordinary Courts cannot anticipate, so neither can they contradict the Judgment of the House of Commons. And consequently, when these *Reports* are compared together, they must prove this, That no Action on the Case, or at Common Law, can ly at all in any Event, if it be not in this one, where the Petitioner's

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Case never comes to be determined at all by the House. This Observation must naturally lead us to doubt, if the Publisher of the *Report*, in the Case of *Prideaux and Morris*, has done Justice to the Opinion of the learned *Holt*, when he says that he seem'd to think, that a Party could have no Action in the case of a false Return, even in an Action upon the Case, until there was a Determination of the House of Commons ; because that is absolutely inconsistent with his Opinion, as set down in the Beginning of that very *Report*, and inconsistent with what he maintained, both in the Case of *Ashbey and White*, and in the Case of *Pattie* and the other *Ailsbury* Men, observed by the same Author, and which are so well known.

3<sup>rd</sup> It is obvious and plain, That this Case destroys the Defender's Pretence, That your Lordships ought not to judge untill the House of Commons determine ; because, as is in Part already observed, if the House of Commons should determine in favours of the Plaintiff, and that his Complaint were to be judged according to the Common Law, without respect to the Statute, then he could have no Action, if the Judgment of the House of Commons went for him : And yet the Defender's Argument is, That he should have no Action till the House of Commons do judge, and that that Judgment do go for him.

But 4<sup>th</sup>, The Law is indeed very plain. The Complaint is brought upon the Statute for a particular Penalty. Your Lordships are required to judge, and with Submission must obey. And this is likewise confirmed by the *Report* last quoted ; for the Plaintiff endeavoured to maintain his Action by an Argument from the Statute of the 7th and 8th of King *William*. The Defendant's Council did not pretend, That the Action did not ly upon that Statute : But then their Argument was, That the Declaration was not brought upon that Statute ; and upon that Ground the Judgment was given for the Defendant. If it had, the Judgment must have gone other

otherwise, unless the Defendant in this Case will please to maintain, That an Action even upon the Statute, cannot ly, where the House of Commons hath given Judgment in favours of the Plaintiff. From all which, the Distinction is very plain, betwixt an Action on the Case, and an Action upon the Statute. Whatever Effect the Judgment of the House of Commons hath in the one, it hath none in the other.

We must indeed be excused to think, after having so great Authorities on our Side, as not only the Opinion of the Chief Justice *Holt*, but the Judgment of the House of Lords, the *dernier Resort*, in that known Case of *Ashbey and White*, that the Action lies at Common Law, for a false Return, without respect to the Statute. It is true, the Majority of the Judges in the Court below, was of another Opinion: As to which, out of respect to them, we will make no Observation. Their Judgment was reversed in the House of Lords, two of the Judges only, and sixteen Lords, concurring with the Judges of the King's Bench, the rest of the Judges and fifty Lords, agreeing to the Opinion of Chief Justice *Holt*. And that great Judge's Words deserve to be remarked. "Where Parliamentary Matters come before us, " as incident to a Cause of Action on the Property of the " Subject, which we must in Duty determine, tho' the in- " cident Matter be Parliamentary, we must not be deterred, " but are bound by our Oaths to determine it,

There are other Cases likewise referred to in the Argument that passed in this Case *Ashbey and White*; such as that of Sir *Edward Barnardiston versus Soane*, where such Action was sustained, and a Reason given by my Lord *Hale*, "That although the Matter related to the Parliament, yet " it was an Injury precedanious to the Parliament: And " where there is an Injury, the Law must afford a Reme- " dy." There is likewise another Case referred to, of Mr. *Ouslow's*, where, it seems, it had been held that the Action lay.

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As to the other other Case of the *Ailsbury* Constables, and *Pattie* and others, which occasioned so much Dispute betwixt the two Houses; it was a Case never finished in a judicial Way, though the Opinion of the House of Lords was delivered in the strongest manner; and therefore it falls to be quotted as a Precedent on neither Side. So far only we must observe, That neither that, nor the Case of *Ashby* and *White*, can at all be brought as Instances against the Plaintiff in the present Case: However they afford strong Arguments for him, because there the Questions were not concerning any parliamentary Matter, whereof the Cognisance was given to the Courts of Law by any Statute. These Suits were against the Returning Officers, not for an undue Return, but were Suits at the Instance of particular Voters, for not being admitted to poll; with respect to which there was no Statute giving Action, either for Penalty or Damages; but the Matter stood only upon the Common Law: And the hinge of the Contraversy turned upon that, Whether the Courts of common Law could judge till the Parliament had judged? But whether the ordinary Courts could judge at all, because the Right of a Voter was said to be a Matter of Parliament, which none but the House of Commons could judge of, or that otherwise the Election of the House of Commons would depend upon the Judgments of inferior Courts. But there is no Parallel betwixt that Case, and a Complaint for a false Return; with respect to which the Act of the 7th and 8th of King *William*, and likewise other anterior Statutes have given an express Jurisdiction to the ordinary Courts in *England*; and the Act of the last Session of Parliament hath given the same in a stronger manner to your Lordships.

And with respect to this Point, the Plaintiff hath not only those strong Authorities already quotted on his Side, but even the Authority of the House of Commons it self. For in that very Case of the *Ailsbury* Men, what the House of Com-

Commons insisted only upon, was this, That no other Court than the House of Commons hath the Determination of Elections, or any Cognizance of such Causes, except where by Acts of Parliament directed. Whence 'tis plain, that even the House of Commons, when carrying Things to the highest, never once doubted, but asserted, that the ordinary Courts had a Power to judge, even in Matters of Election, where Acts of Parliament did so direct; and whether your Lordships have a pretty strong Direction by the Act of Parliament in this Case, is submitted.

There are other Cases which likewise serve to give Light in this Matter, *Norris versus Maudit*, observed in the 5th of the *Modern Reports*,, p. 311. There an Action was brought upon the Statute of the 23d of *Henry VI. cap. 15.* against the Returning Officer of a Burrow for a false Return: And several Exceptions were taken to the Declaration upon point of Form; but no such Demurrer or Objection once insinuated, as that the Court could not judge, without waiting the Determination in Parliament. And such Objection could not fail to have been taken notice of, had it been thought good in Law. In short the Plaintiff does insist upon it, That the Defendant can't, tis believed, bring one Instance wherever such a Doubt was moved, where an Action or Complaint was brought upon the Statute. And it is worth noticing, That the Act of the 7th and 8th of King *William*, was made recently, after Disputes had arisen concerning the Jurisdiction of the ordinary Courts. in Matters of Elections; and was indeed made to put that Matter out of Question, and subject the Returning Officers to the Common Law. And the Act of Parliament upon which the present Complaint is brought, proceeds upon the Recital of the Doubts, Whether the Laws in *England*, imposing Penalties upon false Returns, did extend to *Scotland*: And to obviate such Doubts and Questions for the future; and for the more effectually preventing Returning Officers in *Scotland* making false and undue

undue Returns, this Remedy was introduced, the Jurisdiction given to your Lordships, and you required to proceed in a summary Way. What then can it signify what Doubts might have been before this Act, since in it the express Jurisdiction is given. And it is also proper to observe, That the Action is not given only to the Person who ought to be returned; but in case of his neglecting or omitting to sue for the Penalty within three Months, then any Magistrate, or any Person bearing Office in any of the Burrows of the District, may sue and recover the Penalty to his own Use, provided he bring his Action within a twelve Month after the Date of the Return. How absurd is it to suppose, that an Action should be given to the Office-bearers in Burrows, in order to have the Penalty applied as a Punishment for the Injury done to the Burrows, and yet that Action must depend upon the Motion of the Person Petitioner in Parliament, who may petition or not petition as he thinks fit? There is no Instance of the Law's giving a Remedy for an Injury, and yet making that Remedy depend upon the future Actions of a third Party.

The Council for the Defendant, were pleased to take notice of a Debate that arose in the House of Commons, *Anno* upon Notice taken by some of the Members, That one Mr. *Buller* had sued a Returning Officer before the Courts of Common Law for making an undue Return, without having once so much as petitioned the House of Commons against that Return. But this plainly makes against him: For although such a Debate was stirred, and adjourned from one Day to another, yet it was entirely dropt, and nothing done: Which is a plain Evidence, that the House was convinced that the Thing was agreeable to Law, and that there was no Ground of Complaint, otherwise they would never have dropt the Question. Had there been any Thing in it, that would have concerned the Privilege and Jurisdiction of their own House, amongst so numerous a

Body, it must sometimes happen, that Debates will arise, even upon mistaken Points of Privilege : But where no Resolution is taken, that is in effect a Determination, that there is no Cause for the Question. It was in vain for the Defendant, to endeavour to instruct your Lordships what was Matter of Expediency, by suggesting, That if your Lordships did proceed, it might occasion a Collision of Jurisdictions : For in the *first* Place, the Defendant misapplies the Term. If your Lordships should judge one Way, and the House of Commons an other, that might produce a Contrariety in Judgment, but no Collision of Jurisdictions ; because both Sentences have their legal Effect. The Judgment of Parliament affects the Member as to the Right of sitting and voting in the House : And such Effect a Judgment must have, whether it be right or wrong. Your Lordships Judgment upon the Incident, cannot affect the Right of the Member one Way or other ; yet your Judgment hath its Effect against the Returning Officer, the Law having committed that to your Cognizance. Where the same Matter of Right comes to be tried originally before your Lordships in a Civil Court, and before the Criminal Court in Way of Incident, the Opinions of the two Courts may happen to differ, even upon the Point of Right : But still that makes no Collision of Jurisdiction. And it were an unreasonable Thing to say it, that the one Court might not proceed for fear the other should differ from them in Opinion. Such Contrariety is not even to be supposed. But if it should happen, that is no Reason for stopping the Course of Justice. We all know a famous Instance of that in the Case of the Earl of *Banbury's* Peerage. And no doubt such Things may occur every Day. In short, there can be no Collision of Jurisdiction, where the Suits are different, the Parties different, and the Effects and Consequences likewise different, and where both Sentences can be put to Execution.

*2d*o, It is of no Consequence that the Judgment of the House

House of Commons may differ from your Lordships. This is what your Lordships cannot suppose, when you judge according to Law, without Injury to the Justice of the House of Commons, where the Legislature hath expressly given you the Jurisdiction, and required you to proceed: And though your Determination can be no Rule to the House, it is no Reflection to presume, that in a Point of Law, the Opinion of the proper Court of Law might have its proper Weight every where. The only Danger that can be is, what we are confident will not happen, that your Lordships in so clear a Case, should give a Judgment contrary to Law, or be deterred from doing Justice, for Fear of differing from another Court.

The 2d Part of Mr. *Cant's* Defence, which next falls to be examined, was laid upon this, That he was to comply with the Judgments of the Delegates, and to make his Return as they directed; and that he had done so.

But with respect to this, it is as clear as Sun light, that this is a mere *color quæsitus*. That Mr. *Cunningham* the Delegate for the presiding Burgh, by whose illegal Deeds alone, Mr. *Cant* would pretend to justify himself, and Mr. *Cant*, were acting in Concert and Combination together, to find a Handle for an undue Return; and that Mr. *Cant*, in Place of doing his Duty as the Returning Officer, which undoubtedly was, to receive the Commissions that were presented to him in the proper Form, collusively lay by, suffered Mr. *Cunningham* to do what he thought fit; and then in Place of following the Rules of Law, was pleased to make Mr. *Cunningham's* Actions the Measure of his Duty.

And with respect to this, the Plaintiff must in the first Place put Mr. *Cant* in mind of his Oath, which he swore as Returning Officer, not only that he had got no good Deed nor Promise for making the Return which he was to make, but that he should return the Person elected by the Majority of Votes according to his Judgment, and not according to the Judgment of Mr. *Cunningham*.

In the next Place, we beg leave to observe, that the *Act of Parliament, settling the Method of Election of Commoners for Scotland*, gives the Burghs of the several Districts a Power to elect their Delegates, and to give them Commissions, and gives these Delegates a Power to vote in the Election ; but there is no Power given by that *Act*, nor no other *Act*, to the Delegates to judge in any Question whatsoever. And it is absolutely inconsistent with the Nature of the Thing, that any such Power could be committed to them : For whoever takes upon them to judge, must, before their doing any *Act of Judgment*, have their judicative Authority established in them. Now, supposing, as it happened in this Case, five Delegates appear all with formal Commissions ; how is it possible those Commissions can be judged of by themselves ? It must in the first Place be known that they are Delegates, before they can judge. We beg leave then to ask, When the first Delegate produces his Commission, who is to judge of that ? It is impossible the other four or any of them can, because their own Right is not known ; unless the Defendant will suppose, that the producing a formal Commission to him gave them all a sufficient Power to act as Delegates. And if that be once supposed, then he destroys his own Allegiance, That there remained a Power in any Person whatever to reject such Commissions as were produced formal. These are absolute Inconsistencies.

Mr. *Cant* hath been pleased to mark in the Minute, That Mr. *Cunningham's* Commission for *Innerkeithing* was produced and *approved* : A Word which he most unduly made use of. Had he said *received*, he had spoke as in his Duty : But as to *approved*, who did or could approve of it ? It must be himself, or no body. It could not be the other four ; for no Question to them was stated, nor could be, because as yet it did not appear they were Delegates ; their Commissions were not so much as produced, nor read : And therefore all that could be done was, for Mr. *Cant*, as the

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Minister of the Law in that Particular, to receive it ; and as he received it, it was in like manner his Duty to receive the others as formal ; and no other Person could. And this single Consideration, That the Delegates could not possibly judge of the first Commission produced, shows that by the Nature of the Thing, they can have no Jurisdiction at all in admitting or rejecting Commissions ; for it is ridiculous to say, that the whole four or five should judge upon the first Commission, and yet that they should not have the same Power to judge upon all the rest. Your Lordships must plainly see the absurd and contradictory Consequences of this. At this rate, the first Commission produced, must of course be admitted, because there is no body can judge of it, unless the Power be placed, as we do, in the Returning Officer. And suppose for once it is the Right of the presiding Burgh to produce their Commission first ; then it must clearly follow, that if he, by producing first, have the Power to judge, he can reject every one of the rest, and assume the whole Power of Election to himself, and so return whom he pleases ; and that without any Penalty or any Complaint that can be against him, because forsooth he acts in a judicative Capacity. The Law hath allowed of no such Thing, but hath given the ministerial Power to the Returning Officer ; and of consequence hath tied him down with proper Checks, by imposing a Penalty upon him if he malverse in his Duty.

Mr. Cunningham indeed in this Case proceeded in a grosser way, and every Step of the Procedure shews the wilful and bare-fac'd Collusion betwixt him and the Defendant. We cannot in the *first* place but observe, That there is no Law that gives the presiding Burgh the Privilege so much as to produce their Commissions first ; it is more natural to think, that their Commissions ought to be produced according to the Seniority of the Burrows as they stood in the Rolls of Parliament : For indeed till their Commissions be produced,

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and they a Meeting, there is not so much as Place for an Assent to the Proposition, who is the presiding Burgh. So that the giving any Power of Judgment to the presiding Burgh before the rest be admitted into the elective Body, is at best without Law. But what did Mr. *Cunningham* and Mr. *Cant* in this Case ? Mr. *Cunningham* assumes to himself the Right of producing his Commission first; that is marked *Approved*, though by the by it was subject to one of the same Objections that was afterwards made to Master *Erskine's*. Then the Commission from the Burgh of *Stirling* is produced, and 'tis likewise marked *Approved*, that Mr. *Cunningham* might not be said absolutely to have taken the Power of judging on himself. But then when the Commission is produced from *Dumfermling*, Objections are made, and by whom but by Mr. *Cunningham* himself; so he makes the Objection, whereby indeed he was Party to it, that he himself might judge of it; and indeed solely judge, because in case of the Delegate from *Stirling*, and his differing, then he was, to assume to himself a casting Vote, as he did, on Pretence of his being the presiding Delegate. Supposing *Stirling* and he had agreed, and had been in one Interest, the same Absurdity before stated would occur, that it was in the Power of Two in a good Understanding to reject the Commissions of all the other Three, and so in the Power of the Minority to model the Election as they pleased. Now with respect to this of the casting Vote, in the admitting or rejecting a Commission, we must ask to know on what Law it is founded ? The Act of Parliament does indeed give the Delegate from the presiding Burgh the casting Vote in the Election, in case of Equality, besides the Vote he hath as Commissioner from the Burgh. These are the very Words of the Law, and indeed deserve to be noticed; he hath but one Vote in the Election as Commissioner from the Burgh, but the Law hath given to him personally the casting Vote, in case of Equality: So that it is not impossible nor illegal for the Delegate in

in such Case to vote one way as Commissioner for the Burgh, and according to their Sentiments, and to vote the other way when he gives his casting Voice, upon the Power the Act of Parliament hath given him; he may be single in his Vote for the Election, and may give his casting Vote betwixt the other Four, in case of their dividing for different Persons; and no doubt the Legislative hath acted most rational-ly in this, to give a casting elective Vote to some one or other in the Choice of a Commissioner, in case of Equality. But whatever may be done in matter of Election, it is mon-struous in Law to say, that in the matter of Judgment, upon point of Right, any Person or Judge should have two Votes, that is a Thing done in no Judicature in the World; and when the Matter is considered, there can be no Occasion nor Reason for it, particularly in such a Case as this concerning the rejecting of a Commission; for according to the Defendant's own shewing *prima facie*, if the Commissions be for-mal, they must be produced as to that Effect, as he says, to approve or disapprovc of the Commission of the presiding Burgh: If he don't admit of this, let him reduce his own Scheme to common Sense, if he can; If he do allow this, then the Question must only come, whether one of these Commissioners objected to must stand among the Number as at first, or be laid aside? If upon the Question amongst the Four, the Voices be equal, then it is plain the Commission stands not rejected, and so must continue as a good Commis-sion, and Things remain in the State they first were: So that in every View, as the Law hath given the presiding Delegate no casting Vote in any Power of Judgment, though it hath given him a casting elective Voice; Mr. *Cunningham* and the Defendant acted plainly in a fraudulent collusive way, Mr. *Cunningham* assuming to himself a casting Vote, and the Re-turning Officer in taking any Notice of that casting Vote, which the Law hath not impowered him to number, and which without plain Fraud there was no Occasion for num-bering.

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But then further, to show your Lordships the grossness of the Proceedings in this Case, after Mr. *Cunningham's* Commission, and that from *Stirling* were marked as approven, Mr. *Cunningham*, as appears from the Minutes, to show his strong Inclination to Impartiality, insisted, That though he believed he and the Delegate for the Town of *Stirling*, whose Commissions were approven, had a Right to judge of the Validity of the Commission from the Town of *Dumfermling*, yet he was willing that Question should ly over, until it should appear who of the rest of the Delegates Commissions were without Objection. But then, how was this managed? The Commission from *Culross* was objected to; and to that Objection fell likewise to be judged of by such Commissioners as were unexceptionable. Mr. *Cunningham* made a frivolous Objection to the Commission from *Queensferry*, on purpose for a Pretence, and no more, not to allow the Delegate from the *Queensferry* a Vote in the Question as to the Commission from *Dumfermling*. This Objection made by himself, he afterwards, when the Job was over, and that he had rejected the Commission from *Dumfermling*, passed from, and himself voted to sustain the Commission from the *Queensferry*. This, with Submission, was so grofs, that no Colour can be put upon it. Had he proceeded, as he agreed to do, to let the contraverted Commission from *Dumfermling* alone, until it appeared who had unexceptionable Commissions, then the Commission from *Dumfermling*, and that from *Culross*, that were both objected to, fell to have lyen over, and that for *Queensferry*, to which he alone objected, and afterwards sustained it, ought to have been sustained in its Turn, when it came to be read, and he ought to have made no Objection. In which Case your Lordships see there would have been no Pretence for his casting Vote, because it appears the Opinion of the Delegate for *Queensferry*, was for sustaining the *Dumfermling* Commission: So that here Mr. *Cunningham* plainly counteracted

teracted and contradicted himself. He pretended that all the unexceptionable Commissioners should have a Voice in the Question as to that of *Dumfermling*: But then, contrary to his own Opinion and Judgment, he objected to that of *Queensferry*, until once he should reject that from *Dumfermling*; and then he votes that the Commission from the *Queensferry* is a good one, though the Objection he had unjustly made to it, was no less than that it had been obtained to that Delegate by Bribery and Corruption, and excessive Feasting; and which Objection he then retracted, as *not sufficient* to exclude that Town from their Vote.

But then, to go a little further, let us suppose for once, that the Delegates had a Power of judging of Commissions, which however we take to be impossible and inconsistent, for the Reasons already given; yet for sure that could only be upon the Formality or Informality of the Commissions: But neither they nor Mr. *Cant* could have any Power to judge upon extrinsic Objections not arising from the Form of the Commission, but from things that might require Proof, which they have no Power to take, and such Proof as might be impossible for the Delegate objected to, to bring, since he could not know of any such Objection to be made; and particularly Objections upon the Capacity or Qualification of the Person chosen Delegate: And of this Nature were the Objections made to Master *Erskine's* Commission. Any Objection that can be judged of, must in the *first* place, be proved before it can be sustained. In the *next* Place, if it admits of an Answer, that Answer must likewise be prov'd. There must be an Opportunity to adduce that Proof, and a Power in some Person to take it. Now we beg to know in the Case of any extrinsic Objection to the Delegate, particularly to his Capacity, what Power hath either the Delegates, or the Returning Officer to take such a Proof? Where is the Law that gives it them? If no Law hath given such Power, the Case must be plain, that such Objection can never be received

ved, except by the Judicature that hath a Power to receive the Evidence, and that can be no other than the House of Commons. And this can never better appear, than from the Objections Mr. *Cunningham* was pleased to make in the present Case, *viz.* 1<sup>mo</sup>, That the Sheriff's Precept to the Town of *Dumfermling* was erroneous in its Date. 2<sup>do</sup>, That Master *Erskine* was not qualified to be a Delegate, because he was not a trafficking Merchant bearing Scot and Lot, nor had a Property in the Town to the Value of 3000 Merks. 3<sup>to</sup>, That the Commission was procured by undue Influence. Now we would gladly know whether such Objections were to be admitted without Evidence, or did require to be proved? That Mr. *Cunningham* did in Fact admit them without Evidence is certain: But we apprehend, suppose they had been good, they must have been proved, if the Delegates had had a Jurisdiction to judge of them. But since the Law hath given them no Power to take a Proof, the consequence must either be, that they had no Jurisdiction upon Objections of that Nature, or otherwise, that any preceeding Delegate at least, may make the Objection, and sustain it upon his own Assertion.

Your Lordships will please to notice the first Objection, That the Sheriff's Precept to the Town was erroneous in its Date. How could that possibly appear to the Delegates? The Precept was not, nor did not fall to be brought before them; that was to remain with the Town: How then could this be judged of? and in Fact, what Evidence was brought?

Next, As to the other Objection, That Master *Erskine* did not bear Scot and Lot, and had no Property: Who again could take the Proof of this? It at least might have admitted of an Answer, a Proof that he bore Scot and Lot, or that he had Property. Who could take that Proof? Or how was Master *Erskine* obliged to have Evidence there, upon an Answer to an Objection which no body could imagine? Or was there any Evidence brought even upon that Objection?

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At this rate, your Lordships see, there is no more necessary, but to make a negative Objection, to pretend, for Instance, that the Delegate was minor ; then the Objection must be sustained without Evidence, because it is not to be supposed a Man, though major, could have a Proof of his Majority. He could by no Authority bring such a Proof, and no Person could receive it. The same Thing occurs as to the third Objection, concerning undue Influence. Where was the Evidence of it ? Or who could take the Proof ?

These Considerations make it plain, that neither Delegates nor Returning Officer could notice any extrinsick Objection, not appearing from the Commission, or which required extrinsick Proof either to support or remove it.

The Question was put by the Defendant, What if two Commissions should appear from any one or more Burghs ? Must not the other Delegates have a Power to judge, which of these two Commissions should be received ? But the Answers are plain : 1<sup>st</sup>, By no means ; but the Returning Officer is to receive the Commission that appears to him most formal ; and he must do it on his Peril. 2<sup>do</sup>, Unluckily for the Defendant, that is not the Case ; for here there was but one Commission : And therefore he was absolutely inexcusable not to admit it on any Pretence. But, in the 3<sup>d</sup> Place, we beg leave to put a Question in our Turn : What if double Commissions had come from all the five Burghs ? Who was to have judged then ? Sure it was impossible the Delegates could ; which of itself is sufficient to show, that from the Nature of the Thing it is impossible the Power of receiving the Commissions could ly in the Delegates, but must be in the Returning Officer : And not indeed by what is called a Judicative, but a ministerial Capacity ; he hath properly no Jurisdiction, but is the Minister of the Law for numbring the Votes, and making the Return accordingly. And it affords no Argument in this Case, that the Freeholders in Counties have the Power to judge on the Validity of Votes,

and that the Returning Officer is to follow their Judgment. That is true : Because it is given them by Law, the proper Method is chalked out : Those who are formerly inrolled have the Jurisdiction to admit others. But indeed it were ridiculous to say, that those not formerly inrolled, and whose own Right did not appear, could have a judicative Capacity in admitting or rejecting one another's Votes. Their Case is somewhat parallel with the Delegates, and the Absurdity of giving them a Jurisdiction equal in both. The Practice in *England*, even in Counties, is indeed more to the purpose. There, because the Voters have no formal Jurisdiction, as our Freeholders have, the Power of admitting the Votes is in the Returning Officer.

It is in vain for Mr. *Cant* to endeavour to cover himself, by pretending, That however gross and illegal those Things might be, they were all the Deeds of Mr. *Cunningham*, and not of him ; and that he must submit to the Actings or Determinations of the Delegates : For in the first Place, every Step is so gross and so ridiculous, that no Man without shutting his Eyes, could ever think himself obliged to follow or submit to any Part of it. *2do*, Where is the Law that obliges him to submit to the illegal Actings of the Delegates ? He might as well have suffered any one Delegate who had been in Combination with him, to have produced his Commission first, and then have allowed him to have thrown out the Commissions of all the rest, and after that told us, it was not he, it was the Judgment of the Delegates. The Law hath given him the Ministerial Power, and that he is bound to know. And when he should act himself, he suffers another to act, and then pretends he was to be governed by him, that can be no Excuse, and scarce deserves the Name of an Evasion. If a Returning Officer in *England*, for Instance the Mayor of a Corporation, should allow the Common Council to judge of the Votes, when he knew them plum upon the Interest he favoured, and should then pretend,

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he believed they had a Right to judge who were of the Corporation, and who not, would that afford him any Excuse, if upon their Opinion, he should return the Person not duly elected? 3<sup>to</sup>, What if Mr. *Cunningham*, instead of a determining judicative Vote, had taken upon him two such Votes, would it have been sufficient for Mr. *Cant*, that Mr. *Cunningham* had determined so much did belong to him? The Law no more gave him one Casting Judicative Vote, than it gave him six. 4<sup>to</sup>, Is there any Pretence of *bona fides*, in noticing such an arbitrary Proceeding as this, that Mr. *Cunningham*, by his sole Power, for so it resolved, could drop the Voice of the *Queensferry*, by making an Objection, untill the Job as to the rejecting the *Dumfermling* Commission was over, and then admit that the Vote was good, when according to his own Way, if he had voted that at first, the Delegate for *Queensferry* must have had a Vote upon the Question as to *Dumfermling*? 5<sup>to</sup>, Is it possible for any Man to maintain, That he could so much as believe, that either the Delegates or he, neither of which have a Power to take any Proof, could judge of extrinsic Objections that required a Proof, or sustain Objections without any Proof at all, or that a Man was first to make the Objection, and then determine it by his own sole Authority? These Things are glaring; and it is plain at this Rate, no Returning Officer can possibly ever be punished for an undue Return. Let him suffer the grossest Things, it will be very strange, if he won't find one of the Delegates in the same Interest he favours: And one Delegate with a good Commission, if he have that, there is no more to do but object to all the rest upon any Pretence, and the Returning Officer shall be fully justified, suppose he don't number one of their Votes.

If this Return of Mr. *Cant's* was not a wilful Return, we don't know what can be wilful. If wilful be the same with voluntary, to be sure this was wilful, because Mr. *Cant* was under no Compulsion. He had it in his Power to return whom

whom he judged duly elected ; and if by *wilful* in the *Scots* Stile, should be understood *obstinate*, it was likewise wilful in that Sense, because he was again and again warned of his Danger, and required to do otherwise. If a Man do wrong without Necessity or Compulsion, he does it wilfully ; and whether it was from any Necessity, must be judged from the Circumstances. In the Case of Murder it self, he is guilty of wilful Murder, who neither does it casually, nor *se defendo*, nor *ex subito impetu*, from Provocation, which the Law to some Effect looks on as a Compulsion, and that depends on Circumstances : And just so in this very Case, where every Step is so gross, where there does not appear one Thing that could have led the Defender to do what he did, but a plain Combination with Mr. *Cunningham*, how can it be pretended it was not wilful ? If he had so much as given himself the Trouble to doubt, and to take reasonable Advice, some more Colour might have been pretended, had he in any one Circumstance brought himself under the Suspicion of Impartiality, something favourable might have been presumed : But as will afterwards appear, all his Actings were of a Piece. Why at least might he not have made a double Return, and not assumed the Power of the House of Commons to judge on the Qualifications of a Delegate to declare him incapable, and all that upon no Evidence ? If Mr. *Cunningham* had taken upon him in plain Words to say, as he has done the same Thing in Effect, That he as Delegate from *In-nerkeithing*, had the only Power to elect, had the only Power by himself to admit what Delegate he thought fit, would it have been any Excuse to Mr. *Cant*, if he made the Return conform, because that Mr. *Cunningham* had said so ? Was it not the Returning Officer's Part to tell him he could not do so ? That by Law he was to return according to the Majority of Votes, and there is no Man could exclude those Votes, which the Law required him to number, especially upon such obvious frivolous Pretences.

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The *third* Branch of Mr. *Cant's* Defence was laid upon this, That whoever was to receive the Commissions, whether the Delegates or Mr. *Cant*, the Objections against Master *Erskine's* Commission were well founded in Law, and therefore his Vote justly not numbered. And what these Objections were, have been already stated ; and therefore we need not repeat them, but we hope shall very easily remove them.

The *First* is, That of the Error in the Date of the Sheriff's Precept, *1st*, We take this to be absolutely frivolous. What did it signify that the Sheriff had mistaken the Day of the Month, since the Precept was issued a sufficient Time before the Day of Election ? And that is here admitted, and more than admitted, because their Objection is, That the Precept bore Date as of the *Monday*, whereas it was in the Possession of the Burgh as of the *Sunday*. It is not pretended, That if it had been of the Date as *Monday*, that there was not sufficient Time intervening betwixt and the Day of Election. If then the Burgh was possessed of it before that, where lies the Objection ? What if it had no Date at all, since the Burgh was possessed of it a sufficient Time before the Day ? *2do*, How could Mr. *Cunningham* or Mr. *Cant* take Notice of this ? The Precept was not before them, nor ought not to be. *3to*, *Turpe est doctori* for the Precept for *Innerkeithing*, from which Mr. *Cunningham* came, laboured under the very same Objection, if it had been good for any thing ; and consequently, according to this Argument, Mr. *Cunningham* had nothing to do there, and all his Actings were void. *Lastly*, on this Head, If the Sheriff had not legally issued his Precepts then, either there could be no Election, the Delegates had no Power to act, and Mr. *Cant* had no Power at all to make a Return : Or it must be held, that supposing the Sheriff were negligent in issuing his Precept, yet the Burrows have a Right to send their Delegates to meet at the Day of Election, which is fixed by Law ; and that however

ever the Sheriff may be punished for his Neglect, that can't deprive the Burrows of their Right to vote: And which ever of these be true, the rejecting Master *Erskine's* Commission, on this frivolous Pretence, was equally unwarrantable.

The next and great Objection was, That Mr. *Erskine* was not a trafficking Burges of *Dumfermling*, did not bear Scot and Lot, nor was Proprietor to the Value of 3000 Merks: And the only Support adduced to this Objection was an Act of the Convention of the Royal Burrows *Anno 1709*, whereby they took upon them to enact, " That all Commissions to be granted thereafter to the Persons for electing Burgeses to serve in the Parliament of *Great Britain*, Conventions of Estates and Conventions of Burrows, shall bear the Qualifications both of the Commissioners and Commissions above written, under the Penalties contained in the several Acts of Burrows, over and above the casting of their Commissions." With respect to this, we cannot but observe in the 1<sup>st</sup> place, That this pretended Act of the Burrows seems to be a very extraordinary Piece; if it be looked into, it is almost downright Nonsense in every Word of it. It is introduced with taking Notice of the Act of Parliament, directing the Manner of the Election of the Commoners for *Scotland*: Then it says, " That understanding that in the last Session of Parliament there were several Objections made against the Qualifications of Commissioners, and the Form of their Commissions, and how they ought to be verified, which hath been chiefly occasioned through the not knowing the plat Form of the Burrows: Therefore to prevent further Mistakes, and that Burgeses elected to represent in the Parliament of *Great Britain* may be put to no Trouble or Expences on that Head, the Convention did revive, ratify, &c." What they meant by not knowing the plat Form of the Burrows, or what they call the *plat Form*, would require an Explanation.

tion. Who is it that did not know it ? If they mean any thing, they must mean the Parliament; and therefore in order to instruct the Parliament, that Burgesses elected may not be put to Trouble or Expence, they forsooth take upon them to make this *Act*; a Thing indeed very modest and very respectful to the Parliament ! The Parliament is to be confined to what they are pleased to make Evidence or not Evidence ! and they are to regulate the Qualifications of Persons Electors or Elected !

But then in the next place, Your Lordships will please to notice what it is they revive, the *Act of the General Convention of Burrows Anno 1642, Ordaining all Commissions to Parliament, Convention of Estates, or Burrows, to be subscribed by the Magistrates themselves and the Clerk of the Burgh, in Name of their Council, and the Seal of the Burgh affixed thereto, or by way of Extract under the Subscription of their Clerk and Seal of Cause.* How ridiculous this is, must at first View appear : We were at their making this *Act 1709* in an united State ; there was no Commissions from Burrows to Parliament ; the Commissioners were not to be chosen by the Magistrates or Council, but by Delegates, and, in place of a Commission, were to be returned by the Clerk of the presiding Burgh ; yet this *Act* foolishly ratifies the *Act 1642*, concerning the signing Commissions to Parliament.

Then they ratify and confirm the Qualifications of the Persons established by the present plat Form ; that is to say, That the Commissions testify the Commissioners to be *Men fearing GOD, &c.* Here again is the same Blunder repeated, *That the Commissions to Parliament must testify and declare such and such Qualifications, when there are no such Commissions.* Then follows a third Clause, *That all Commissions to be granted thereafter to Persons for electing Burgesses to serve in the Parliament of Great Britain, Conventions of Estates, and Conventions of Burrows, shall bear the Qualifications both of the Commissions and Commissioners above written.* How to make Sense of this, no body can know :

Are there any Commissions to Persons for electing Commissioners to serve in the Convention of Burrows ? Or what is the Meaning of that, *Shall bear the Qualifications both of the Commissioners and Commissions above written ?* What is the Qualifications of the Commissions ? Hath a Commission a Qualification ? This we take to be unintelligible. But these Things we observe only by the by, in honour to this vain and idle A&t.

But then what we directly answer is, That the Convention of Burrows neither have nor had any Power to settle either the Qualification of Members to Parliament or Delegates, or to impose any Qualification upon them whatsoever, nor yet to enact a Form of Commission under the Pain of Nullity : We conceive such Power lyes in none but the Parliament ; and that this was a direct Usurpation of a Parliamentary Power, which is one of the highest Crimes we know. The A&t of Parliament, which is declared to be a part of the Treaty of Union, both fixed the *Right of Election and Manner* of it, as far as the Parliaments of both Nations thought fit or necessary : And who gave the Convention of Burrows either to add or diminish to that A&t, is what cannot be understood.

That A&t hath declared, *That none shall be capable to elect or be elected, to represent a Shire or Burgh in the Parliament of Great Britain for this Part of the United Kingdom, except such as are now capable by the Laws of this Kingdom to elect or be elected as Commissioners for Shires or Burghs to the Parliament of Scotland.* From this Clause it seems very plain, compared with the rest of the A&t, particularly that part of it appointing the Election for Burghs to be by Delegates, that the Words, *capable to elect*, hath Reference only to the Voters in Shires, because the Voters for Commissioners to Burghs were not to be as formerly, but by Delegates ; and that with respect to Burrows, the Qualification is only put upon the Person to be elected ; and there is no Qualification at all put upon the Delegate, other than that he is to be the Person chosen by the Burgh.

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But then, to go a little further, let us suppose that those Words, *capable to elect*, had Respect to the Delegates ; then to be sure every Person ~~was~~ capable to be elected Delegate, who by the Laws of *Scotland* at the Time of the Union, or before it, could have been elected to represent a Burgh in the Parliament of *Scotland*. Now, will any Man pretend with Reason, that no Man at the Union could be elected Member for a Burgh, who was not a residing trafficking Merchant, nor had Property to the Extent of 3000 Merks ? The contrary is evident and plain ; and no Man can look into the Rolls of Parliament, who must not see the contrary : Not one Half of the Members for Burghs came under that Qualification, nor do they to this Day. Let us but look into the present List, or what hath been since the Union ; and according to this Topick, the one Half of the Elections are and have been void : Or if we look into the Lists of the Delegates that have been since the Union, the same Thing will happen as to them. But indeed this is a new Invention, taken up to serve the present Job in this Case only : At this Moment, more than one half of the Elections would be void, if this were Law.

But, to go yet further, in the strictest Sense every Person must be capable to be a Delegate, that is, to elect, who by the Law of *Scotland* was capable to vote in the Election of a Member of Parliament. Now we hope it is certain, and so your Lordships have expressly determined in several Cases, particularly that of *Cowpar*, that Persons were capable of being Counsellors in Burgh who were Burgeesses, tho' neither residing trafficking Merchants, nor having Property in the Burgh : And to be sure Counsellors had a Power to vote in the Election of Members of Parliament, notwithstanding their want of those Qualifications contained in this Act of the Burrows. When then the Capacity of voting, of electing, and being elected, is thus settled by the Act of Parliament itself, which is Part of the Treaty of Union ; how the Convention of Burrows could take upon them to settle other

Qualifications, they nor none else can account for. We would gladly know what gave the Convention a Power to fix upon Lands to the Extent of three thousand Merks, more than six or ten. If they could settle any Qualification, they could settle to what Extent they please : And so at this rate the Qualification of Members of Parliament, and consequently the Constitution of the Parliament itself, may forsooth be settled, limited or extended, by the Authority of the Convention of Burrows. The Right of settling such Qualifications is one of the highest parliamentary Rights ; it is what the House of Commons themselves can't do, without the Concurrence of the whole Legislature : But it seems the Convention of Burrows have a higher Power.

We find no *Act of Parliament of Scotland* limiting the Qualifications of Members for Burrows to trafficking Merchants, or not one Word of its being necessary they should have such Extent of Property within the Burgh ; and we can never admit that any lesser Power than the Parliament of *Scotland* could have settled the Qualification of Members before the Union, or that a lesser Power than the Parliament of *Britain* can do it now.

The Council for the Defendant were pleased to say, That the Privileges of Burrows were ratified by the Union : That the Convention of Burrows had anciently made Acts, such as that of the 1642, *for regulating the Qualifications of Members of Parliament* ; and that they were warranted so to do by the general Act empowering them to make *Regulations and By-laws for the Weal of their own State*.

But in the first Place, that does not appear to be true in Fact ; for the *Act 1642*, as recited in this *Act 1709*, appoints only the Manner of signing Commissions, which we insist is more than they had Power to do, but settles nothing as to the Qualifications of Members ; and this they call their Plat Form, is a late Invention of their own. 2d, Though the general Laws gives them a Power to make By-laws for the Weal of their State ; that is *Acts*, with regard to Merchandise,

chandise, and such other Things which may depend upon their Consent; how can that extend to any Matters parliamentary, or settling the Qualifications of Members of Parliament? They might as well pretend to determine what Number of Members we should have. None can regulate the Constitution of Parliament, but the Parliament it self: And for that same Reason we do insist upon it, that whatever they may have taken upon them, they had no Power by Law to settle even the Form of Commissions to Parliament.

The Privileges of the Royal Burrows are preserved to them by the Union; but who gave them the Privilege to determine the Qualifications of their Members? As the Convention of Burrows hath Power to make Rules in ordinary Administration, for the Good of the whole Burrows, so every particular Burgh hath as strong a Power of making By-laws within themselves, and for regulating Matters within Burgh: But will it thence follow that they have severally a Power to settle the Qualifications of their Members of Parliament? We might likewise observe, that it is the Privilege of the Burrows that is reserved by the Treaty; but not a Word of the Convention; nor not a Word of their Powers. And whatever Powers they might formerly assume, they can now exercise none inconsistent with, or peculiar to the Parliament of *Great Britain*; and such we do insist is the power of settling the Qualification of Members.

The Defender took notice of some Decisions in the Parliament of *Scotland*, about the 1681, finding that Members of Parliament for Burghs ought to be trafficking Merchants. But in the first place, they vouch this from no better Authority than Mr. *Forbes's Collection*, which will go no great Way; the whole Circumstances of the Case don't appear. But the same Author, as he makes the Remark, subjoins these Words, *But this is not observed*; that is, that this is gone into Disuse. It is not the Practice of Parliament. It was not so at the Time of the Union; and that is the Period fix'd upon by the Treaty, and Act of Parliament as to the Qualifications.

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The Defender likewise took notice of the *Act of Parliament James VI. Par. 4. cap. 33.* Enacting, *That no Person take upon him the Place of more of the Estates of Parliament than one, to wit, that wherein he professes himself to live, and whereof he takes his Style.* We do not well understand to what purpose this *Act* was taken notice of; is it, that no Man who is a Baron, can be a Member for Burrows? If that be the Meaning, surely that Law is in Diffuse: And by what Rule, according to such Construction of the Law was *Mr. Cunningham* either a Member for Burghs, or a Delegate. The Defendant is surely put greatly to Shifts, when he must have Recourse to such obsolete Statutes; at the same Time the Meaning of the Law never was any other than that the same Man was not to act at the same Time in double Capacities in Parliament. He was not to be chose, both for a Baron and a Burges.

Upon the whole it must be obvious to your Lordships, and to every Person who hears the State of the Fact, That the Proceedings in this Case, have been the most gross and barefaced that ever have happened, or can happen again, carried on in plain Contempt of the Law, under no less Aggravations than the Usurpation of a parliamentary Power, and that if this Return be not an undue Return; if *Mr. Cant* in this Case hath not refused and neglected to return the Person duly elected, no such Neglect or Refusal can be laid to the Charge of any Man hereafter; a Colour, a frivolous pretence can always be invented.

But then besides the Circumstances that appear from the very Minutes themselves, there are other extrinsic Facts and Circumstances, that contribute to show this was a form'd Combination, between *Mr. Cunningham* and the Defendant. *Mr. Cunningham* himself at first stood for this Election, and in his Service, *Mr. Cant* was a known Agent, and can be proved so; he is *Mr. Cunningham's* Agent and Manager in his private Affairs, and hath for long depended considerably upon

on him, even with respect to Money Matters. When Mr. *Cunningham* became disqualified, then he used his Interest, in Opposition to Master *Erskine*, and at last joined with Captain *Halket*. How Mr. *Cant* gave Way to his irregular *Actings* during the Time of the Election, your Lordships have already seen. After the Election, Mr. *Cant* shewed himself so far impartial and disinterested, that notwithstanding repeated Requisitions, he did not think fit to offer to Master *Erskine* so much as an Extract of the Minutes for many Days after the Election was over, and not till he had returned Captain *Halket*. He promised to give them before he should go to *Edinburgh*. He kept himself out of the Way, so as *Access* was scarce to be had to him. He then went to *Edinburgh*, close in Company, and guarded by Mr. *Cunningham* and Captain *Halket*. He allowed himself to be detained in their Company, and never could be found but with them, during the Space of several Days, till at last the Return was signed and delivered to the Sheriff, and so in every Step acted with them in close Concert, and would not so much as expose himself to the Advice or Information of others, until his Job was perfected. The undue Return, made even these extrinsick Facts serve to show Mr. *Cunningham* and he were in a plain Combination: But the Proceedings themselves, vouched by his own Minutes, are sufficient to convict him, and those who may rely upon them.

*In respect whereof, it cannot be doubted, but your Lordships will repel Mr. Cant's Defences, and find, That he hath unduly returned Captain Halket as the Person elected, and hath neglected and refused to return the Complainant, who was intitled to be returned; and that therefore, he is liable to the Penalty of the Act of Parliament, and that you will condemn him in Payment of the same accordingly, for an Example to others, not to act in so manifest Contempt of the Law in Time coming.*

RO. DUNDAS.



